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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MIRKA JAROS, Plaintiff and Appellant, v. PETERSON & CHAPMAN et al., Defendant and Respondent.	D039877 (Super. Ct. No. GIC758455)

APPEAL from a judgment of the Superior Court of San Diego County, J. Richard Haden, Judge. Reversed.

In November 2000, plaintiff and appellant Mirka Jaros, M.D. (Dr. Jaros or Jaros), filed this legal malpractice complaint against defendants and respondents, the law firm of Peterson & Chapman and attorney William D. Chapman, et al., (Peterson) claiming that it had negligently represented her in litigation arising out of her alleged breach of a relocation agreement with a hospital corporation, Tenet HealthSystem Hospital, Inc. (Tenet; not a party to this appeal). Under this relocation agreement, Tenet agreed to

make monthly payments to her for one year, for the stated purpose of supporting Dr. Jaros's relocation to San Diego, and under a related agreement, Jaros assigned those monies to her then-employer WomanKind, a Medical Group, Inc. (WomanKind; also not a party to this appeal).

In the underlying action brought by Tenet on a breach of contract theory, Jaros was held liable for $260,147 damages under a liquidated damages clause in the relocation agreement. (*Tenet HealthSystem Hospital, Inc. dba Alvarado Hospital Medical Center v. Womankind California, Inc., et al.*, (Super. Ct. San Diego County, 1998, No. 725979) ("Tenet action" or underlying action).) Thereafter, she sued Peterson for professional negligence, breach of contract and breach of fiduciary duty.

Peterson brought a successful motion for summary judgment, arguing that as a matter of law, Jaros could not show causation of loss, or that "but for" its alleged negligent acts, the jury in the underlying action would have rendered a different verdict. Jaros appeals, contending that triable issues of material fact remain on the professional negligence and breach of fiduciary duty claims alleged, due to Peterson's conflicting loyalties in representing both her and her former employer WomanKind with regard to related contract issues, on which conflicting positions were taken at trial. We agree with Jaros that the issue of causation of loss cannot now be determined as a matter of law, and reverse the summary judgment.

FACTUAL AND PROCEDURAL HISTORY

A

Underlying Action

The factual and procedural background of this case begins in October 1995, when Dr. Jaros signed a physician associate agreement to work for WomanKind. Dr. Joyce A. Kakkis, the president and medical director of WomanKind, agreed to pay her $70,000 a year and told her the medical group was trying to get funding from Tenet. In connection with this agreement, Jaros and Kakkis discussed whether Jaros would be able to get staff privileges from Alvarado Hospital ("Hospital") because of her limited in-patient practice, and Jaros applied for such privileges.

There were several related documents associated with this transaction, in addition to the physician associate agreement. Most importantly, the record contains a relocation agreement entered into January 2, 1996, between Tenet's predecessor and Jaros. The relocation agreement provides that Jaros will receive monetary relocation assistance from Tenet for a year, in payments of approximately $26,000 per month. The relocation agreement provided that in the event of a breach, Dr. Jaros would have to repay Tenet all monies advanced to Dr. Jaros under the agreement. Jaros is disputing whether she actually signed this agreement, or whether the WomanKind president, Dr. Kakkis, signed it for her without her knowledge or permission. There are several versions of this relocation agreement in the record, with different-appearing signatures by Dr. Jaros, as will be discussed *post*.

The relocation agreement has several significant provisions, including the liquidated damages clause providing that in the event of breach of the agreement, Dr. Jaros will repay monies received. The agreement also requires her to obtain staff privileges at the Hospital. In connection with the relocation agreement, Jaros signed an agreement, entitled "Acknowledgment and Assignment," assigning the income she received under the relocation agreement from the Hospital/Tenet to her employer, WomanKind. The agreement recites that it was entered into under an abundance of caution due to legal questions about whether an employer of a physician could receive monies directly from a hospital for relocation assistance, in light of federal legislation commonly known as the "Stark" legislation.[1]

The record also contains an "Amendment to Relocation Agreement" with Jaros's signature, changing the previous name of the hospital corporation to Tenet and correcting a marketing provision of the agreement. This amendment does not include a date. It is attached to some but not all of the copies of the relocation agreement in the file.

The record also contains a letter from Jaros, on WomanKind stationery, to the Hospital CEO, dated April 21, 1997, requesting that payment be completed under the relocation agreement.

After Jaros worked for a few months at WomanKind in 1996, her hours were reduced and she eventually left. She had not been able to obtain staff privileges at the Hospital as contemplated by the relocation agreement.

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1 The Stark Law is the federal Ethics in Patient Referrals Act, a statute governing

In November 1998, Tenet sued WomanKind for breach of contract, seeking to recover monies it had invested in its clinics. In turn, both WomanKind and Tenet filed cross-complaints. As pertinent here, Jaros was brought in by Tenet as an individual cross-defendant. Tenet was seeking damages based on an alleged breach of the relocation agreement, under the liquidated damages clause, alleging that Dr. Jaros had not obtained staff privileges at the Hospital as agreed. Although other doctors who had worked for WomanKind were also named as cross-defendants, they were never served and only Jaros was pursued by Tenet individually.

After being served with the cross-complaint, Jaros filed an answer in pro. per. In her declaration filed in these summary judgment proceeding, she states, "Shortly thereafter, I consulted with an attorney friend of mine and advised him of my situation. My friend agreed to assist me and wrote a letter to Mr. Chapman asking Wom[a]nkind, his client, and my employer at that time, to provide me with a defense in the *Tenet* cross-claim. After some discussion, Wom[a]nkind agreed to provide me a defense on the *Tenet* cross-claim." On January 3, 2000, immediately before trial, Mr. Chapman substituted in as her attorney of record in the Tenet action. The record contains a waiver of potential claims between Jaros and WomanKind. According to her declaration, "At no time before or after Mr. Chapman became my attorney of record, did Mr. Chapman discuss with me the merits of my case or the existence of Wom[a]nkind's cross-claim against Tenet. I was not aware that Womankind was seeking to recover money from Tenet based on the

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medical ethics in patient referrals to hospitals. (42 U.S.C. § 1395nn.)

relocation agreement. Further, I was never asked by Mr. Chapman to sign any waiver of a conflict of interest. I relied on Mr. Chapman to defend me against Tenet's cross-complaint for breach of contract."

At jury trial, Tenet took the position that Dr. Jaros breached the relocation agreement by failing to obtain privileges at the Hospital, one of Tenet's healthcare facilities. A judgment was ultimately entered in favor of Tenet and against Dr. Jaros in the amount of $260,147. Jaros filed an appeal, but abandoned it.

B

Current Action for Legal Malpractice

In November 2000, Jaros filed this action against the Peterson firm, contending attorney Chapman, as her counsel in the underlying Tenet case, failed to represent her adequately, in particular by failing to advance the appropriate defenses against breach of contract at trial on the cross-complaint against her. In particular, Jaros alleges that attorney Chapman failed to provide her testimony at trial denying that she had signed the relocation agreement, and testifying that Dr. Kakkis had signed it for her without her permission or forged it. She alleges that attorney Chapman represented interests that were adverse to her in the underlying action, and failed to advise her of an actual or potential conflict of interest or certain indemnity rights she had with respect to his other client, WomanKind. As damages, she alleged that the $260,147 judgment was entered against her as a direct and proximate result of the negligent professional representation.

In support of her allegations of malpractice, Jaros claims in her summary judgment opposition declaration that although she was asked to sign a document prepared

by Mr. Chapman before he would represent her, waiving indemnity rights against WomanKind, he did not provide her with any advice or counsel on the document. Also according to her declaration, "When the trial started, Mr. Chapman told me during lunch on the first day, before the jury was selected, to go home and to call him that evening. I called him as requested and he told me that he did not need me to come back to the courtroom and he would call me if he did. I called him again over the next few days and each time he said that he did not need me to testify and to not come in. [¶] I never paid Mr. Chapman for the services he provided me at trial. My understanding was that Mr. Chapman was to be compensated by Womankind for the services he was providing on my behalf. He did not disclose to me that he was on a contingency fee arrangement with Womankind."

During trial of the underlying action, a copy of the relocation agreement with Jaros's apparent signature was admitted into evidence by stipulation of counsel, as Exhibit 103.

C

Summary Judgment Motion and Opposition

In September 2001, Peterson brought a motion for summary judgment, contending its conduct was not the cause of Dr. Jaros's loss at the underlying trial, because a relocation agreement existed with Dr. Jaros' genuine signature, although that particular document was not used in the Tenet action as Exhibit 103. Peterson argues that even if it were negligent to fail to call plaintiff to testify at trial, its actions or inactions were not the cause of the adverse judgment since a valid relocation agreement existed and Dr. Jaros

breached the agreement by failing to obtain Hospital staff privileges as agreed. According to Chapman's declaration, he decided not to call Jaros as a witness, both because he did not think she could convincingly deny she had failed to obtain staff privileges as agreed, but also because he was afraid her heavy Polish accent would alienate the jury. He argued that he had provided a defense that was adequate to meet the issues presented in the underlying action, by bringing out evidence that Tenet had not cooperated with Dr. Jaros's efforts to obtain Hospital privileges, and Tenet had not given her proper notice that it was terminating the relocation agreement. He argued to the jury that the relocation contract was illegal under the Stark legislation, because it was tied to increasing hospital admissions, in addition to providing relocation assistance. However, no jury instructions were allowed on that issue in the underlying action.

Dr. Kakkis of WomanKind testified that there were multiple copies of the relocation agreement that were kept in different locations. Dr. Kakkis recollected that the relocation contract was signed by Tenet representatives and then delivered to her to submit to Dr. Jaros. Dr. Jaros then signed it and gave it back to her, and Dr. Kakkis's organization sent the original back to Tenet, while keeping a copy.

In opposition, Jaros contended she was never presented with a copy of the relocation agreement and never approved anybody signing the agreement for her, and "I would not have signed the agreement because of the guarantee Tenet wanted in the event that I could not be credentialed at Alvarado Hospital. I later learned that Womankind received checks from Tenet pursuant on my behalf [sic] and cashed them without my

knowledge."[2] Jaros contended that affirmative defenses could have been presented to the Tenet breach of contract claim, regarding her efforts to perform under the relocation agreement, a lack of notice from Tenet regarding termination of the agreement, and other defenses such as waiver, laches, Tenet's failure to perform or to meet the conditions of the agreement, and invalidity of the liquidated damages clause.

In further support of her opposition, she lodged a declaration of the Tenet trial attorney, Mr. Helton, in the underlying case on Tenet's cross-claim against Dr. Jaros, stating that it had come to his attention that the signature on the relocation agreement may not be that of Dr. Jaros. The attorney then states, "Had I known that Exhibit 103 was not actually signed by Dr. Jaros, I probably would not have pursued a claim against Dr. Jaros on behalf of Tenet." Dr. Jaros also provided deposition testimony from defendant attorney Chapman stating that he represented WomanKind in the underlying action on a contingency fee basis.

Because Jaros was disputing that she had ever signed the relocation agreement that was admitted into evidence by stipulation in the underlying litigation, she contended there were genuine triable issues of fact as to whether a reasonable jury might have returned a verdict in her favor, if evidence of lack of formation of contract had been presented at the Tenet trial. Accordingly, her request to allow further expert declarations

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2 Jaros alleged that Dr. Kakkis had signed documents for another doctor, Dr. Julia Ford, also without permission, and that this should support her claim that she never signed the relocation agreement. However, on this record, this allegation is not fully supported with respect to the issues concerning Dr. Jaros and is not currently relevant to the issues on appeal.

and investigation was granted, to allow her thirty (30) days to have her handwriting expert review the alleged original documents and submit additional papers, with defendant to reply.

In the additional papers submitted by Jaros, her expert opined that the signature page of the relocation contract had been signed separately by Jaros and had been misleadingly attached to the body of the document at a later time, so that it could be inferred that Jaros never saw the entire document.

Subsequently, the court issued a telephonic ruling and scheduled oral argument. The issues as identified by Jaros included:

> "1. Whether the evidence raises a triable issue of fact as to whether plaintiff knew what she was signing when she signed the page 4 of Exhibit B. [¶] 2. If plaintiff did not know what she was signing when she signed page 4 of Exhibit B, could Tenet have enforced the relocation agreement. [¶] 3. Whether plaintiff's testimony that she was never given the complete relocation agreement establishes that plaintiff never consented to the relocation agreement. [¶] 4. Whether Kakkis' conduct in inducing Jaros to sign the last page of the relocation agreement without telling Jaros what she was signing establishes that plaintiff never consented to the relocation agreement. [¶] 5. Whether plaintiff ratified any agreement with Tenet."

D

Trial Court Ruling

In its ruling of November 30, 2001, granting the motion for summary judgment, the trial court stated that Peterson had carried its initial burden of proof to show a missing element from each cause of action alleged (professional negligence, breach of contract, and breach of fiduciary duty). The court relied on the declaration of defendant Chapman, the relocation agreement, and the showing that Jaros had been denied privileges at the

hospital. The court referred to Jaros's declaration that she did not sign the relocation agreement, as conflicting with her earlier deposition admitting her signature to page 4, and on a final page, the amendment to relocation agreement. The trial court concluded Peterson had shown Jaros possessed no admissible evidence on the issue of causation, and: "She presents no juror declarations or expert declarations. Rather her alleged evidence is mere speculation as to the motives of her attorney and the jury. Plaintiff has failed to carry her secondary burden of raising a material question of fact by submitting admissible evidence."

Jaros appeals.

DISCUSSION

I

STANDARDS FOR LEGAL MALPRACTICE AND SUMMARY JUDGMENT

"The elements of a cause of action for legal malpractice are (1) the attorney-client relationship or other basis for duty; (2) a negligent act or omission; (3) causation; and (4) damages. [Citations.]" (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 863 (*Kurinij*).) In order for a defendant in a legal malpractice action to prevail on summary judgment, "it must show that one or more elements of appellant's cause of action cannot be established or that [it] has a complete defense to appellant's causes of action. [Citation.] If it meets that burden, the burden of proof then shifts to appellant to show that a triable issue of one or more material facts exists. (Code Civ. Proc., § 437c, subd. (o).)" (*Kurinij, supra,* at p. 863.)

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*), in the course of clarifying the law that courts must apply in ruling on motions for summary judgment, the Supreme Court reiterated that the trial court "must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Id.* at p. 843.) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id*. at p. 850.)

Also in *Aguilar*, the Supreme Court noted that if the trial court concludes that the plaintiff's opposing evidence or inferences raise a triable issue of material fact, the court must deny a defendants' summary judgment motion. However, "even though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference could show or imply to a reasonable trier of fact. . . . In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself." (*Aguilar, supra,* 25 Cal.4th at p. 856; italics omitted.) This means that an inference relied on by an opposing party in summary judgment proceedings may defeat a moving party's showing to the contrary, only if the inference is reasonable and

only if it implies the alleged wrongful conduct by the defendant was more likely to have occurred than was any permissible conduct. (*Id.* at p. 857.)

In this case, it is not disputed that Peterson owed a duty to Jaros. Also, Peterson does not directly address the issue of any breach of duty or negligence. Instead, both in the trial court and in this court, it is the causation element which the parties dispute. "'Proof of legal malpractice requires proof not only of negligence by the lawyer but also of causation, a trial within a trial to establish that, but for the lawyer's negligence, the client would have prevailed in the underlying action.' [Citations.]" (*Kurinij, supra*, 55 Cal.App.4th at p. 864.) Ordinarily, causation is a question of fact not to be resolved by summary judgment, unless: "The issue of causation may be decided as a question of law only if, under undisputed facts, there is no room for a reasonable difference of opinion. [Citation.] 'The question about what would have happened had [the lawyer] acted otherwise is one of fact unless reasonable minds could not differ as to the legal effect of the evidence presented. [Citation.]' [Citation.]" (*Ibid*.)

II

CAUSATION ISSUE

As stated in Jaros's opening brief, the relocation agreements are at the heart of this case. She contends that her defense of lack of formation of this contract should have been presented at the trial of the underlying case, and if it had been presented, she would not have suffered the adverse judgment in the Tenet action. Our task is to consider the evidence presented by both sides to determine if reasonable minds can differ as to the

legal effect of the evidence presented, with respect to "what would have happened had [the lawyer] acted otherwise." (*Kurinij, supra*, 55 Cal.App.4th at p. 864.)

Stated another way, "Unless a party suffers damage, i.e., appreciable and actual harm, as a consequence of his attorney's negligence, he cannot establish a cause of action for malpractice. Breach of duty causing only speculative harm is insufficient to create such a cause of action. [Citation.] '[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable. [Citation.]'" (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661-662.) "'Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty . . . .' [Citation.]" (*Id.* at p. 663.) "'[T]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages. [Citations.]' [Citations.]" (*Ibid.*) Further, it must be recognized that there is a "myriad of variables that affect" litigation, as well as settlements of same, all playing into the causation and damages equation. (*Ibid.*)

A

Ruling

We first take note that the trial court ruling lists several reasons in support of granting the motion, including the evidence of the signatures; specifically, that Jaros does not deny that her signature appears on page 4 of the version of the relocation agreement presented to her at her deposition as Exhibit U. The ruling further notes that she denies she was ever provided with the entire agreement. The ruling also cites to the existence of

another document signed by Dr. Jaros, the amendment to the relocation agreement, evidently to support an inference that she had actually entered into the relocation agreement. The trial court then cites to the evidence of the denial of her Hospital privileges to show there was a breach of the relocation agreement, as proven in the underlying action.

The ruling also refers to a lack of any other evidence of causation of the loss through the alleged inadequate legal representation. The court noted that Jaros had not presented any juror declarations or expert declarations, and characterized her alleged evidence as "mere speculation as to the motives of her attorney and the jury." We are to review this ruling of the trial court de novo, and need not address each and every detail of its document interpretation, or its rationale. (*Davey v. Southern Pac. Co.* (1897) 116 Cal. 325.) Rather, the issue is whether the record as a whole reveals any triable issues of fact on whether there was causation of damage here, due to the overall nature of the Peterson representation of Jaros at trial.

B

Conflict of Interest Authority

Jaros bases her causation arguments mainly on Peterson's failure in the underlying action to call her to testify about her defense of lack of formation of the agreement. She argues that her expert evidence from her handwriting examiner about the documentary evidence supports this argument. She also argues that due to attorney Chapman's simultaneous representation of her former employer, WomanKind, his ability to present a defense for her was impaired, and this shows more likely than not that his actions or

inactions caused her damages or loss. Dr. Jaros contends that at the trial of the underlying action, attorney Chapman had to take the position that the relocation agreement was valid in order to protect WomanKind's position in the litigation as a cross-complainant. However, attorney Chapman would have had to take an opposing position to present Dr. Jaros's desired defense, that the relocation agreement was invalid as to her. This, she argues, shows a violation of the Rules of Professional Conduct regarding adverse representation. (Cal. Rules of Professional Conduct, rule 3-310(C)(1)(2), (F).) Specifically, Peterson's showing in support of its summary judgment motion included a declaration from attorney Chapman to the effect that he had strategic reasons for not calling Dr. Jaros to testify in the underlying action (her inability to deny that she had not obtained hospital privileges, and her strong accent). He obtained her waiver of claims against her former employer WomanKind, in return for providing the defense. However, she contends there was no explanation given of this nor of any conflict of interest among the two clients.

In 1 Witkin, California Procedure (4th ed. 1997) Attorneys, section 500, pages 605 to 606, the Rules of Professional Conduct relating to potential or actual conflicts of interest are outlined.[3] Under rule 310(C)(1), (2), an attorney may not, without the informed written consent of each client, either: "(1) Accept representation of more than one client in a matter in which the interests of the clients *potentially* conflict," or (2) "Accept or continue representation of more than one client in a matter in which the

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3 All further rule references are to the Rules of Professional Conduct unless noted.

interests of the clients *actually* conflict." (Italics added.) These provisions are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation, and other situations. (1 Witkin, Cal. Procedure, *supra,* § 500, subd. (2), p. 606.) Even if several parties prefer to employ a single counsel on a matter, the attorney "must disclose the potential adverse aspects of the multiple representation and must obtain the informed written consent of the clients as specified by the rule. Moreover, if the potential adversity should become actual, the attorney must obtain the further informed written consent of the clients." (1 Witkin, Cal. Procedure, *supra,* § 500, subd. (2), p. 606.)

Also in 1 Witkin, California Procedure, (*supra,* § 502), rule 3-310(F) is described: "An attorney may only accept compensation for representing a client from a person other than the client when the following conditions are met: (1) There is no interference with the attorney's independence of professional judgment or with the client-lawyer relationship. [Citation.] [¶] (2) Information relating to representation of the client is protected as required by [Bus. & Prof. Code §] 6068(c) [citations]; and [¶] (3) The attorney obtains the client's informed written consent." (1 Witkin, Cal. Procedure, *supra,* § 502, pp. 606-607.)

An attorney's violation of rule 3-310(C) (representation of potentially adverse clients) can establish a breach of fiduciary duty as a matter of law. (*American Airlines v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1034.) The purposes of the rule, in light of the perils it seeks to avoid, require attorneys to avoid being placed

in a position of trust where they could be compelled to choose which of two conflicting loyalties to honor, without proper disclosures of potential or actual conflicts of interest. (*Id*. at p. 1035.)

C

Application

To analyze the causation issue, we must first discuss the documentary evidence, and secondly the alleged conflict of interest that existed between Peterson's primary client, WomanKind, and its former employee, Dr. Jaros, in the underlying action. The legal effect of the evidence presented in the respective showings in support of and in opposition to the summary judgment motion must be evaluated in light of the statement in *Aguilar, supra*, 25 Cal.4th 826*:* "Even though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference could show or imply to a reasonable trier of fact. . . . In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself." (*Id*. at p. 856; italics omitted.) "'The issue of causation may be decided as a question of law only if, under undisputed facts, there is no room for a reasonable difference of opinion. [Citation.]' [Citations.]" (*Kurinij, supra*, 55 Cal.App.4th 853, 864.)

With reference to the documentary evidence, it is essentially not disputed that there were several versions of the relocation agreement, and that a stamp was used by someone at WomanKind to place Dr. Jaros's signature on the copy that was eventually used at the underlying litigation. It is also essentially not disputed that Dr. Jaros signed

the page 4 signature page, and that it was attached to a copy of the relocation agreement, most probably at a later time. The record also contains undisputed evidence that Jaros signed the acknowledgement and assignment regarding the monies she was to receive from Tenet, passing them on to her then-employer WomanKind. There is also a signed amendment to the relocation agreement, from which it may be inferred that she had knowledge of the existence of the relocation agreement. Her signature also appears on a letter on WomanKind stationery, requesting complete performance under the relocation agreement, at a time when Tenet was refusing to perform (April 1997). However, she contends the signature stamp was used on this letter, without her permission.

In her interrogatory responses in this action, Jaros identified her desired defenses that were not presented in the underlying action as her lack of opportunity to testify, regarding the parties' respective performance under the relocation agreement, her attempts to obtain privileges at the hospital, as well as defenses such as waiver, laches, invalidity of the liquidated damages clause, and lack of authentication of the relocation agreement itself. On appeal, she now argues that the relocation agreement was a sham, in light of the limited benefits she received from it, as opposed to the greater benefits received by WomanKind and Tenet. She contends the acknowledgment and assignment document is the only real information she had as to the transaction, which was recognized in the assignment itself as problematic in view of the Stark legislation. (See fn. 1, *ante*.) While we cannot consider arguments newly made on appeal, we think these allegations generally fall within the scope of the malpractice claims made in the complaint, with

respect to the conflict of interest allegedly existing between WomanKind and Jaros, both as clients of the Peterson firm.

Certainly, an inference can be drawn that Jaros had some knowledge of the relocation agreement and received some benefits of it, in terms of her related $70,000 salary from WomanKind. She accordingly assigned the $296,000 relocation benefits she was to receive from Tenet to WomanKind, as shown in the acknowledgment and assignment. However, that is not the end of the story. She was held personally liable for breach of contract of the relocation agreement in the underlying action, for the entire amount paid by Tenet, $260,147. This raises the question of whether, if she had been represented at the underlying trial by an attorney free of the alleged conflicts of interest, she might have been able to offer some explanation or theory why these documents do not demonstrate she ratified the relocation agreement so as to be held properly liable for damages under it, or whether her waiver of potential claims between herself and WomanKind was sufficient. The exhibit that was presented to the jury at the underlying trial, by stipulation, was shown to her as Exhibit P at her deposition, and she claimed that it did not bear her signature, so it must have been forged. Her declaration further asserts that she was never questioned by her attorney in the underlying action about her potential testimony, or the document authenticity, but was sent away from trial.

With respect to her waiver of potential claims as to WomanKind, her declaration states, "At no time before or after Mr. Chapman became my attorney of record, did Mr. Chapman discuss with me the merits of my case or the existence of Womankind's cross-claim against Tenet. I was not aware that Womankind was seeking to recover money

from Tenet based on the relocation agreement. Further, I was never asked by Mr. Chapman to sign any waiver of a conflict of interest. I relied on Mr. Chapman to defend me against Tenet's cross-complaint for breach of contract." It is not appropriate to equate this waiver of potential claims between herself and her former employer, such as indemnity for loss, with a waiver of a conflict of interest as to the attorney who was representing both of them simultaneously. (Rule 310(C)(2): an attorney may not, without the informed written consent of each client, represent more than one client in a matter in which the interests of the clients *actually* conflict; also see, rule 310(F).) Rather, due to the conflicting positions which Peterson was required to take with respect to the validity of the relocation agreement, as to WomanKind and Jaros, the evidence and its legitimate inferences create an adequate showing of causation of loss to defeat the summary judgment motion. By this we mean that her evidence creates a triable issue as to whether the alleged wrongful conduct by the defendant attorney was more likely to have occurred than was any permissible conduct or strategic decisions to be taken within conflict-free representation. (See *Aguilar, supra*, 25 Cal.4th at p. 857.)

The purposes of the Rules of Professional Conduct that govern representation of adverse interests are to protect attorneys from being placed in positions of trust where they could be "compelled to choose which of two conflicting loyalties" to honor, without any proper disclosures of potential or actual conflicts of interest. (*American Airlines v. Sheppard, Mullin, Richter & Hampton, supra*, 96 Cal.App.4th 1017, 1035.) We think the evidence Jaros has presented raises a triable issue of fact as to whether she was harmed by the legal representation she received in the underlying action. This evidence presented

by Jaros includes the fee arrangement that Peterson had with WomanKind, a contingency fee based upon recovery of any breach of contract damages by WomanKind against Tenet. In return for representing Jaros, Peterson required her to sign a waiver of potential claims against WomanKind. However, it is possible to infer that based on the fee arrangement, Peterson had a stronger incentive to present WomanKind's views of the validity of the relocation agreement, as opposed to Jaros's views that it was invalid. The last minute circumstances of his retention by Jaros and the limited nature of his representation of her position in the underlying action suggests that he may not have thoroughly investigated and presented all defenses that she might have had available to her, for our purposes of evaluating the summary judgment ruling. For example, although Peterson argued to the jury that the relocation agreement was illegal, because it was intended to increase hospital admissions by the relocated doctors, he was unable to obtain jury instructions on that point in the underlying action.

Moreover, it is disingenuous for Peterson to complain on appeal that the expert evidence regarding the signature pages of the relocation agreement copies was not available to it at the time of the underlying trial, because that begs the question of whether further investigation should have been done at that earlier time by an attorney who was seeking to represent Jaros's interests to the fullest, or who had made the necessary disclosures to the clients. Similarly, it is no answer to the summary judgment opposition for Peterson to argue that it is clear that Jaros breached the relocation agreement, so that there are no possible issues regarding attorney malpractice on his part. She is alleging that she would not have been held liable for that breach, had it not been

for the allegedly inadequate legal representation she received in the underlying action. Also, she provided a declaration from the attorney who represented Tenet in the underlying case on its cross-claim against Dr. Jaros, stating that it had come to his attention that the signature on the relocation agreement may not be that of Dr. Jaros. That attorney states, "had I known that Exhibit 103 was not actually signed by Dr. Jaros, I probably would not have pursued a claim against Dr. Jaros on behalf of Tenet." This clearly supports a finding of a triable issue regarding harm attributable to the Peterson firm's actions or inactions in the underlying litigation.

In light of the conflict of interest Jaros has alleged, a reasonable trier of fact could conclude that under all the circumstances, "but for" Peterson's actions, her underlying case would have been resolved in her favor. She has alleged more than a breach of duty causing only speculative harm, and has raised more than mere speculation or surmise about the reasons she was held liable under the relocation agreement. (*Thompson v. Halvonik, supra*, 36 Cal.App.4th 657, 661-662.)

When a reviewing court examines a record on which summary judgment was granted, it is required to determine what the evidence or inferences drawn from it could show or imply to a reasonable trier of fact. (*Aguilar, supra*, 25 Cal.4th at p. 856.) "In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself." (*Ibid*.) We think that based on the trail of documentary evidence here and the different inferences that can be drawn from it, together with the allegations of conflict of interest on the part of Peterson in defending Jaros against Tenet's breach of contract claims, a trier of fact should be presented with the

causation issue. The summary judgment is accordingly reversed for further appropriate proceedings.

DISPOSITION

Reversed. Costs are awarded to appellant.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.